

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 -

In the Matter of
Implementation of Water Quality Objectives
for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary,
Amending License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887,
11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726,
12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638,
5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368,
15764, 22316, 14858A, 19304, and 14858B, respectively) of the United States Bureau of
Reclamation and Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443,
14445A, 17512, and 17514A, respectively) of the Department of Water Resources.

SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the
Sacramento-San Joaquin Delta Estuary

**ORDER STAYING PHASE 8 OF THE BAY-DELTA WATER RIGHTS HEARING AND
AMENDING REVISED DECISION 1641, PENDING DISMISSAL**

BY THE BOARD:

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (SWRCB) takes actions to facilitate implementation of an agreement that may lead to a settlement of the potential responsibilities of numerous water users to implement the objectives in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, adopted May 22, 1995 (1995 Bay-Delta Plan).¹ In the absence of this order, the SWRCB would promptly convene the remainder of

¹ From July 1, 1998 through December 21, 1999, the SWRCB conducted Phases 1 through 7 of the Bay-Delta Water Rights Hearing. On December 29, 1999, the SWRCB adopted Decision 1641, determining some of the responsibilities for meeting the objectives in the 1995 Bay-Delta Plan and resolving other related issues. On April 11 and 12, 2000, the SWRCB conducted a session of Phase 8 of the Bay-Delta Water Rights Hearing to consider a petition for change filed by South Sutter Water District in connection with a settlement agreement to resolve the
[footnote continues on next page]

Phase 8 of the Bay-Delta Water Rights Hearing to consider the water users' potential responsibilities. Because this order delays completion of Phase 8 of the hearing, this order requires regular reviews of progress. If, after review, the parties have not made adequate and timely progress, the SWRCB ~~may~~will reconvene Phase 8 of the hearing. This order includes terms and conditions that, among other things, accomplish the following measures:

1. This order temporarily stays the remaining parts of Phase 8 of the Bay-Delta Water Rights Hearing for a period of not less than six months from the date of this order, subject to terms and conditions specified herein.
2. This order amends conditions 1 and 2 on page 146 of SWRCB Decision 1641² (D-1641) by changing the expiration dates of those conditions.
3. This order requires a periodic review of the parties' progress in establishing long-term protections for the beneficial uses of Delta water.

This order is based on the draft settlement agreement (Draft Agreement) among Department of Water Resources (DWR), United States Bureau of Reclamation (USBR), the State Water Contractors, the Northern California Water Association, the Contra Costa Water District, and the San Luis and Delta-Mendota Water Authority. The administrative record of this order includes the entire hearing record of the Bay-Delta Water Rights Hearing, from July 1, 1998, through April 12, 2000. The parties to the Draft Agreement presented it to the SWRCB in draft at a workshop convened by the SWRCB on January 11, 2001. The parties requested that the SWRCB ~~stay the resumption of~~dismiss Phase 8 of the Bay-Delta Water Rights Hearing ~~until they have time to~~, with the dismissal to take effect after they negotiate and agree upon a first, and then a second, work plan for projects that will assure, among other things, that the flow-dependent objectives in the 1995 Bay-Delta Plan will be met. The DWR Director and the USBR Regional Director have indicated that their agencies ~~will~~ assume responsibility for meeting the objectives during the stay of the hearing and for a ~~period year~~ thereafter and will accept an extension of Conditions 1 and 2 in SWRCB Decision 1641. The SWRCB considered

responsibilities of water right holders on the Bear River. The SWRCB approved the petition on July 20, 2000, in Order WR 2000-10.

² SWRCB Decision 1641 was adopted on December 29, 1999, and was revised on March 15, 2000, pursuant to Order WR 2000-02. All references herein to D-1641 are to the revised decision.

and heard comments on a draft of this order at a Board meeting on March 7, 2001. This order is consistent with the Draft Agreement takes into consideration both the Draft Agreement and the comments of the parties.

2.0 BACKGROUND

2.1 Procedural History

This order is part of a series of actions by the SWRCB to protect the beneficial uses of water in the Bay-Delta Estuary against the adverse effects of water diversions. The SWRCB's practice in addressing the Bay-Delta issues is first to adopt water quality objectives that, when implemented, will protect the beneficial uses. The SWRCB implements the objectives through water right orders and by requesting or directing that other agencies take appropriate actions including water quality control measures to be implemented by the Regional Water Quality Control Boards.

The current water quality objectives are set forth in the 1995 Bay-Delta Plan. The current water right requirements to implement the Bay-Delta flow-dependent objectives are set forth in D-1641 and in Order WR 2000-10. D-1641 includes both long-term and temporary implementation requirements. Order WR 2000-10 requires partial implementation that will remain in effect up to thirty-five years. In D-1641 and in Order WR 2000-10, the SWRCB assigned responsibilities, for specified periods, to water users (including the USBR and the DWR) in the watersheds of the San Joaquin River upstream of Vernalis, the Mokelumne River, Putah Creek, Cache Creek, within the boundaries of the North Delta Water Agency, and within the Bear River watershed. These responsibilities need not be revisited in the near future. These responsibilities require that the water users in these watersheds will contribute specified amounts of water, and that the DWR and the USBR will provide backup by ensuring that the objectives are met in the Delta.

To meet the potential responsibilities that are not yet assigned, but may be assigned to water users in areas not yet addressed, D-1641, in Conditions 1 and 2 on page 146 thereof, requires that the DWR and the USBR temporarily implement the objectives. Conditions 1 and 2 also require that the DWR and USBR meet certain objectives that the SWRCB does not contemplate assigning to other parties, such as export limits and gate closure requirements. Conditions 1 and 2 will remain in effect only until the SWRCB makes further decisions establishing the responsibilities of water right holders in the areas where the potential responsibilities have not

yet been determined, but these conditions are set to expire no later than November 30, 2001. This order stays the resumption of Phase 8 of the Bay-Delta Water Rights Hearing to facilitate implementation of the Agreement, while extending the responsibilities of the DWR and the USBR under Conditions 1 and 2 to meet the water quality objectives in the 1995 Bay-Delta Plan.

In comments submitted for the March 7, 2001, Board meeting, DWR Director Hannigan stated that:

“Many of the actions identified in the Phase 8 Agreement are elements of the long-term Plan for the CALFED Bay-Delta Program. The CALFED Program requires that there be balanced, demonstrable progress toward meeting each of the Program’s objectives for ecosystem quality, water supply, water quality, and levee integrity. DWR and USBR, who will be signatories to the Agreement, are two of the principal CALFED agencies who have signed and are committed to implementing the Record of Decision (ROD) for that Plan. We [DWR] want to re-emphasize that our actions in implementing the Agreement must be consistent with, and as to the projects set forth in the CALFED ROD, fully integrated with the CALFED Bay-Delta Program.”

2.2 Physical Setting

The Bay-Delta Estuary includes the Sacramento-San Joaquin Delta, Suisun Marsh, and the embayments upstream of the Golden Gate. The Delta and Suisun Marsh are located at the confluence of the Sacramento and San Joaquin rivers, which converge to flow westward through San Francisco Bay. The watershed of the Bay-Delta Estuary produces water that is used in much of the state for municipal, industrial, agricultural, and environmental purposes. The watershed is a source of drinking water for two-thirds of the state’s population. The State Water Project, operated by the DWR, and the Central Valley Project, operated by the USBR, store water upstream of the Delta, release the stored water into the Delta, and export both the stored water and uncontrolled flows³ from the Delta. The two projects export water from the Delta to areas south and west of the Delta through a system of water conveyance facilities.

³ Uncontrolled flows include both natural flow and abandoned flow.

Fish, wildlife, and other public trust resources also use the waterways of the Bay-Delta Estuary and its tributaries. Some of the fish that reside in the estuary or migrate through it are protected under the state or federal Endangered Species Act. Additionally, migratory birds and other animals use the marshlands of the estuary for food and habitat.

3.0 THE DRAFT AGREEMENT

3.1 The Draft Agreement

The Draft Agreement is a draft of a ten-year agreement among its parties to work cooperatively to settle their obligations or potential obligations to meet the objectives in the 1995 Bay-Delta Plan. The parties have not yet executed the Agreement. The parties proposing the Agreement are the DWR, the USBR, the State Water Contractors, the Northern California Water Association, Contra Costa Water District, and the San Luis and Delta-Mendota Water Authority. These parties are representing the interests of (a) the water right holders and water supply contractors of the DWR and the USBR south of the Delta, the Contra Costa Water District, and the water users receiving water from the DWR through the North Bay Aqueduct (known as “Export Water Users”); (b) the water right holders and water users within the watershed of the Sacramento River⁴ (known as “Upstream Water Users”); (c) DWR; and (d) USBR.

The Draft Agreement includes at least two significant provisions. First, DWR and USBR will meet any potential, as-yet undetermined, responsibilities of the Upstream Water Users to implement the flow-dependent objectives in the 1995 Bay-Delta Plan. Second, it will become effective if the SWRCB adopt an order that includes, among other things:⁵ (a) a stay of Phase 8 pending completion of two work plans; and (b) an extension of the expiration of Conditions 1 and 2 of D-1641.

⁴ This order stays a determination of the potential responsibilities of the water right holders and water users within the watersheds of the Calaveras and Cosumnes Rivers as well as the interests represented by the parties proposing the Agreement.

⁵ The SWRCB recognizes the possibility that the parties may not execute the Agreement before this order is adopted, and therefore the Agreement may not become effective simultaneously with this order. If the Agreement is not executed before this order is adopted, this order nevertheless will go into effect on the date when it is adopted. The stay provided in this order will expire if the parties do not complete and approve the work plans by the dates specified in this order or if at any time the parties are not making adequate progress.

3.2 Discussion of Parties' Request for a Stay

3.2.1 *Justification for a Stay*

The parties proposing the ~~The Draft~~ Agreement justify their request for a stay by pointing to the term in the Draft Agreement that provides that the DWR and the USBR will meet the objectives referenced in Conditions 1 and 2 of D-1641 until one year after the termination of the Agreement. During the term of the Agreement, the parties to the Agreement will seek to develop water supply projects to replace the water supplies dedicated to meeting the objectives. If the Agreement is successful, the parties anticipate that they will enter into a further agreement or agreements, before the Agreement expires, that will allocate responsibilities to permanently implement the objectives.

The Draft Agreement, if executed, has a strong potential to resolve issues that otherwise would require a lengthy and contentious hearing involving numerous parties with competing interests. In the absence of agreement by the parties whose water rights might be amended, a decision after a Phase 8 hearing likely would result in further litigation. At the January 11, 2001 workshop and at the March 7, 2001 Board meeting, the SWRCB heard broad-based support for the Draft Agreement. Not all parties support implementation of the Draft Agreement, however, and some parties oppose adoption of this order. Many uncertainties exist as to whether the Draft Agreement will ultimately succeed in resolving the issues, however. The Draft Agreement is a framework for the ~~parties~~ DWR and the USBR to meet the objectives for an interim period while the parties proposing the Agreement pursue projects that will ~~improving~~ improve the reliability of the water supply for most water users within California. The projects contemplated in the Draft Agreement would develop new water supplies to make up for the water needed to meet the objectives. In other words, the parties proposing the Agreement hope to avoid a permanent reduction in water supplies for consumptive use by developing new water supply projects.

The Draft Agreement ~~It~~ does not contain project descriptions, amounts of water to be derived from potential projects, costs of potential projects, environmental issues regarding the individual projects, timetables other than a rough timetable for Sites Reservoir, or plans for financing. To begin implementing the Agreement, the parties will prepare two work plans, one due six months from the date of this order, and one due twelve months from the date of this order. Completion

of the work plans will require intensive technical, legal, and policy efforts, plus cooperation among the parties. There is no guarantee that the Agreement will succeed, and no certainty as to its term. It could terminate at any time between its execution and ten years from its effective date, or it may never be executed.

It is the policy of the SWRCB in the Bay-Delta proceedings to encourage the parties to resolve among themselves the responsibilities for meeting the objectives in the 1995 Bay-Delta Plan, and to bring their joint proposals for establishing responsibilities to the SWRCB for approval. More time is needed to complete the detailed proposal, in the form of the work plans, and to determine whether the projects proposed in the work plans will be implemented. In effect, the parties to the Draft Agreement are requesting that the SWRCB ~~give them more time to~~ dismiss them from the hearing before they negotiate their agreement, in the form of reach an agreement that will implement the objectives in the 1995 Bay-Delta Plan. The proposed Agreement, plus the two work plans and perhaps additional commitments on the part of the parties to the proposed Agreement, may in the future form the components of an agreement that will implement the objectives for a long term. The currently proposed Agreement, however, will not result in long term implementation of the objectives, before resuming Phase 8 of the hearing. The effort put forth by the parties to date appears sufficient to justify a delay of six months to allow the parties to complete the first of the two work plans to the SWRCB. This order provides for a further delay of six months in resuming the hearing if the parties complete and approve the first work plan, to allow time to complete and approve the second work plan.⁶ If the parties are making substantial progress toward a ~~permanent~~ long term means of meeting the objectives, the stay will remain in effect.

3.2.2 Elements of this Stay Order

The Draft Agreement provides that it will become effective if this order contains several elements. The first element is a stay of Phase 8, pending development and approval by the

⁶ If the parties complete and approve the second work plan, the SWRCB could, at the request of the parties or on its own motion, convene a hearing to determine whether the Agreement, including the work plans and any other commitments of the parties, is adequate as a basis for the SWRCB to establish long term responsibilities of the parties to meet the objectives, or to dismiss the Bay-Delta Water Rights Hearing. ~~If the SWRCB held a hearing and did not establish long term responsibilities for parties to meet the objectives based on the agreement and work plans,~~
[footnote continues on next page]

parties to the Draft Agreement of two work plans, described in paragraphs 5(a) and 5(b) of the Draft Agreement. The parties to the Draft Agreement will complete the first work plan within 180 days after the SWRCB approves this order, and will complete the second work plan within one year after the SWRCB approves this order. The parties will approve both work plans within sixty days after they are complete. The Draft Agreement lists standards for the content of the work plans, and this order requires that those standards be met in the work plans. This order stays Phase 8, but the stay will expire if the parties do not approve a work plan on time, if the work plans are not implemented according to their time limits, or if at any time the SWRCB determines that it is not satisfied with the progress the parties are making toward negotiating their long term responsibilities to meet the flow-dependent objectives in the 1995 Bay-Delta Plan. Upon expiration of the stay, the SWRCB will give notice of resumption of Phase 8. The notice may allow time for preparation of any necessary environmental documentation by the SWRCB.

The second element of the Draft Agreement requires the SWRCB to lift the stay and proceed with Phase 8 if the parties notify the SWRCB that either work plan is not completed or approved and the Agreement is therefore terminated. This order contains the requirements noted above, regarding the first element, and also provides for the resumption of Phase 8.

The third element the Draft Agreement specifies is that this order should extend the expiration of the DWR's and the USBR's obligations under Conditions 1 and 2 of D-1641 to the earlier of the completion of Phase 8 or June 30, 2003. After the work plans are completed, the Draft Agreement specifies an extension of Conditions 1 and 2 up to one year after the Agreement terminates. This order extends the expiration of ~~these obligations~~ Conditions 1 and 2 until no sooner than June 30, 2003, and further extends the expiration date until two years, but sets the expiration to occur two years after (a) the parties notify the SWRCB that the Agreement has been terminated, or (b) the SWRCB determines that the progress toward ~~implementing the Agreement~~ negotiating long term responsibilities to meet the objectives is inadequate, or (c) the SWRCB gives notice that it will convene a water right proceeding to determine whether to either extend

~~it could resume Phase 8 or continue the stay. If it established long term responsibilities, it could consider dismissing Phase 8 as part of an order establishing long term responsibilities.~~

the effect of this condition or replace it with another condition that meets the objectives. Certain parties have urged the SWRCB to expedite any future proceeding to establish long term responsibilities to meet the objectives, and have suggested that no more than one year is required. It is unlikely, however, that the SWRCB can conduct a proceeding of the magnitude of Phase 8 and issue a decision within one year. The SWRCB is committed to expedite the hearing, and will endeavor to complete the hearing within less than two years if it can do so without impacting the interests of the parties in having a full and fair hearing. If ~~The two-year time for expiration of Conditions 1 and 2 in the DWR and USBR water rights is the minimum that would be necessary if the SWRCB finds that it must prepare supplemental environmental documentation or other documents before resuming Phase 8, an additional year to two years may be necessary. The likelihood of needing supplemental environmental documentation will increase with the amount of time that passes before the Agreement either terminates or the SWRCB determines that the parties are not progressing toward a settlement of the long term responsibilities to meet the objectives.~~

The fourth element the Draft Agreement specifies is that this order (a) automatically dismisses Phase 8 if the parties to the agreement complete and approve both of the work plans and (b) extends the requirements of Conditions 1 and 2 in D-1641 until one year after the termination of the Agreement or such sooner time as the SWRCB completes a water right proceeding to allocate the responsibilities to meet the objectives in the 1995 Bay-Delta Plan. As explained above, this order provides an ~~two-year~~ extension of the requirements of Conditions 1 and 2, ~~or until the SWRCB adopts a water right decision that implements the flow dependent objectives in the 1995 Bay-Delta Plan, whichever occurs sooner.~~

This order also includes a process under which Phase 8 may be dismissed after an SWRCB proceeding following the agreeing parties' approval of both of the work plans. Additionally, this order does not provide for an automatic dismissal, for two reasons. First, ~~At this time,~~ the SWRCB cannot determine ~~at this time~~ whether or not the work plans or other potential commitments by the parties proposing the Agreement will be adequate to ensure are likely to result in long term protection of the beneficial uses of Bay-Delta waters.

Likewise, the work plans and the Agreement, if they are to be a basis for concluding Phase 8, will require environmental documentation that has not yet been prepared. The work plans will propose physical projects that will be used to help meet the objectives in the 1995 Bay-Delta Plan in the long term. These projects will develop new water supplies. Whether they make up for other water used to meet the objectives or meet the objectives directly, they will facilitate efforts to attain the objectives. The Agreement links the commitments of DWR and USBR to implement the objectives to a long term water management program. The Agreement states that new off-stream surface storage (such as Sites Reservoir) is an essential part of the long term water management program. Because any dismissal would be based on the commitments of the parties proposing the Agreement, the environmental impacts of the Agreement and the work plans are the foreseeable consequences of a dismissal of Phase 8 by the SWRCB. The SWRCB cannot defer consideration of an environmental document addressing these foreseeable effects until after it approves a dismissal of Phase 8. (*Stanislaus Natural Heritage Project, Sierra Club et al. v. County of Stanislaus* (1996) 48 Cal.App.4th 182 , 206 [55 Cal.Rptr.2d 625].)

The dismissal would be based on the commitments made by the parties proposing the Agreement. The dismissal would not amount to an approval of any of the individual projects proposed pursuant to the Agreement and work plans. Therefore, it should be possible for the SWRCB to dismiss if it has before it staged, program, or master environmental documentation for the Agreement, plus specific environmental documentation of the effects of a dismissal of Phase 8. Specific documentation likely would need to include analyses of the commitments of the parties proposing the Agreement, their overall plan of action, and the likely effects of mitigating water supply impacts by increasing developed water supplies.

Accordingly, the SWRCB will review the work plans, any additional commitments of the parties to meet the objectives, and any environmental documentation prepared to analyze the foreseeable environmental effects of a dismissal based on the Agreement and work plans, before deciding whether to dismiss Phase 8 of the Bay-Delta Water Rights Hearing.

~~Second, the Draft Agreement contemplates that the SWRCB will hold an evidentiary hearing after the Agreement terminates, to give parties an opportunity to present evidence and argument~~

~~before the SWRCB establishes the final responsibilities of the parties.~~ A dismissal would end the current proceeding, requiring the SWRCB to commence a new proceeding to determine the responsibilities of the remaining parties after the Agreement terminates. The administrative record that has been compiled to date for the proceeding would not be in the administrative record for the new proceeding unless it was resubmitted and considered again for admission. Further, it could be argued that non-hearsay evidence in the current hearing record, including all of the transcripts of testimony, would be hearsay in the new proceeding.⁷ In the Bay-Delta Water Right Proceeding, the SWRCB has assured the parties that it will maintain a single hearing record for all phases of the hearing, to ensure that parties need not resubmit evidence repeatedly to have it considered and used as the basis for findings related to phases of the hearing other than the phase in which it was submitted. The SWRCB will take into consideration this commitment, as well as other factors, including the age of the record and the applicability of the existing record to future changes in physical circumstances, when it considers whether to dismiss the proceeding after both work plans have been completed and approved by the parties to the Agreement.

The Draft Agreement provides that the DWR, the USBR, and a number of their water service contractors will agree to extend the projects' responsibilities to meet Conditions 1 and 2 during the term of the Agreement and for a reasonable but limited period thereafter, to allow the SWRCB time to conduct further proceedings and establish permanent responsibilities for meeting Bay-Delta water quality objectives. Although the Draft Agreement would extend Conditions 1 and 2 for a shorter period, such proceedings are likely to require two years or more, as discussed above. ~~is a more reasonable period for such proceedings.~~ The longer period is needed to ensure that any necessary additional environmental documentation can be prepared and to ensure that the implementation of the objectives does not lapse. A lapse in implementation could have serious consequences for the beneficial uses the objectives are intended to protect.⁸ In the absence of a hearing, the SWRCB could not avoid a lapse in

⁷ If evidence is hearsay, the SWRCB under some circumstances cannot use it as a basis for making findings unless there is corroborating non-hearsay evidence in the record. (Gov. Code § 11513(d).)

⁸ Conditions 1 and 2 require full implementation of the objectives for municipal, industrial, and agricultural beneficial uses, and require full implementation of the flow-dependent objectives for fish and wildlife beneficial uses for an interim period. The objectives protect the public interest.

implementation by placing responsibility for meeting the objectives on another party or parties.⁹ Accordingly, the most reasonable approach is to retain the existing responsibilities to meet the objectives until the SWRCB is able to complete a hearing and make a decision after the hearing.¹⁰

4.0 ENVIRONMENTAL CONSIDERATIONS

Under the California Environmental Quality Act (CEQA) (Pub. Resources Code §§ 21000, et seq.), the SWRCB is the lead agency for preparation of environmental documentation for this order. The SWRCB has prepared and certified a final Environmental Impact Report for the Implementation of the 1995 Bay-Delta Water Quality Control Plan (Bay-Delta EIR). The Bay-Delta EIR fully analyzes the effects of several alternatives for assigning responsibility to water right holders in the watershed of the Bay-Delta Estuary, including Flow Alternative 2, under which the DWR and the USBR are jointly responsible for meeting all of the flow-dependent objectives in the 1995 Bay-Delta Plan. D-1641 adopts Flow Alternative 2 as an interim measure, by including Conditions 1 and 2 in the water rights of the DWR and the USBR. This order amends Conditions 1 and 2 of D-1641 by extending the periods for which the requirements set forth in those conditions are effective.

⁹ The hearing record for D-1641 supports continuing the implementation of the objectives in the 1995 Bay-Delta Plan during the course of the Bay-Delta Water Rights Hearing. See, for example, the Bay-Delta EIR, which analyzes the effects of imposing Conditions 1 and 2 on the DWR and the USBR.

¹⁰ This conclusion addresses only the need to extend the responsibilities of the DWR and the USBR for an adequate interim period to accommodate the stay requested by the parties to the Draft Agreement. This conclusion does not predetermine the allocation of responsibility after completion of any further proceedings before the SWRCB, should the Agreement ultimately prove unsuccessful in resolving the responsibilities among the parties. The DWR and the USBR historically have been responsible for meeting Bay-Delta objectives. SWRCB Decision 1641 continues the responsibility of the DWR and the USBR to meet the municipal, industrial, and agricultural objectives, and the flow-dependent fish and wildlife objectives on an interim basis. To issue a stay of Phase 8, as requested by the DWR, the USBR, and the other parties to the Draft Agreement, it is necessary to continue the interim requirements imposed on the DWR and the USBR. If it did not extend the responsibility of the DWR and the USBR for at least two years beyond the termination of the stay, the SWRCB would have to conduct a hearing on Issue 6 (set forth in the Notice of Resumption of Public Hearing for Phase 8) to determine whether to require a party or parties to meet the objectives for the interim period beyond November 30, 2001. Proceeding with Issue 6, in which the parties to the Agreement would have competing interests, could undermine the Agreement. Considering their historical involvement, the public interest in continuously implementing the objectives, their role as public entities managing vast quantities of the state's water supply, and the lack of any other means for setting interim requirements without interfering with implementation of the Agreement, it is reasonable to continue the responsibility of the DWR and the USBR for the a period specified in this order long enough to establish long term responsibilities to meet the objectives.

CEQA contemplates that agencies may make serial decisions relying on a single EIR. (Cal. Code Regs., tit. 14, §§ 15165, 15168.) This order is one in a series of orders relying on the Bay-Delta EIR.

Except as applied to the Joint Point of Diversion and the San Joaquin River Agreement, the findings set forth in D-1641 in sections 14.3.1, 14.3.4, 14.3.5, 14.3.6, 14.3.7, 14.3.8, and 14.4 are applicable to the inclusion of Conditions 1 and 2 in the permits of the DWR and the USBR for an extended period. Those findings are incorporated herein by reference to the extent that they are applicable to this order. The SWRCB will file a Notice of Determination under CEQA after it adopts this order, and the Notice of Determination will state that this order relies on the Bay-Delta EIR.

ORDER

A. IT IS HEREBY ORDERED that Phase 8 of the Bay-Delta Water Rights Hearing is stayed¹¹ for a period up to December 31, 2012, as specified below. The purpose of the stay is to allow water right holders whose rights might be amended after Phase 8 to reach a mutual settlement of their responsibilities to meet the flow-dependent objectives in the 1995 Bay-Delta Plan. The stay will expire or will be supplanted by a dismissal under the circumstances specified below. ~~Upon expiration of~~ If the stay expires and the Bay-Delta Water Rights Hearing has not been dismissed, the SWRCB will reconvene Phase 8 of the Bay-Delta Water Rights Hearing, will determine whether the water right holders in the watersheds of the Sacramento, Cosumnes, and Calaveras

¹¹ The stay does not apply to the following proceedings related to the Bay-Delta Proceedings:

- (a) Any proceedings necessary to respond to a writ of mandate or other court order, decision or opinion issued in connection with litigation to which the SWRCB is a party.
- (b) An order necessary to implement new water quality objectives or amendments to the 1995 Bay-Delta Plan.
- (c) A proceeding on an issue that is sufficiently unrelated [e.g. carriage water] to the subject of the Agreement that the proceeding will not adversely affect implementation of the Agreement. The SWRCB shall hold a workshop to obtain input from the parties before initiating any such proceedings.

- (d) A proceeding relating to the implementation of the narrative salmon doubling objective set forth in Table 3 of the objectives in the 1995 Bay-Delta Plan. The existing D-1641 terms and conditions for fish and wildlife protection provide reasonable protection for a range of aquatic species in the Bay-Delta Estuary and help implement all of the objectives, including the narrative salmon doubling objective. Compliance with the existing flow objectives and other objectives in the 1995 Bay-Delta Plan may be sufficient to implement the salmon objective. Moreover, statutorily mandated non-flow fish restoration programs currently being implemented in other forums (e.g., CVPIA implementation and CALFED) will help implement the salmon objective. As other programs are implemented and monitored, the SWRCB will review the progress toward meeting the objective and may take additional action if needed.

Rivers have responsibility to meet the flow-dependent objectives in the 1995 Bay-Delta Plan, and will determine the amount of such responsibility. ~~During the stay, Until the SWRCB convenes a hearing to determine the responsibilities of water right holders in the watersheds of the Sacramento, Calaveras, and Cosumnes rivers, including the DWR and the USBR, to meet the flow-dependent objectives in the 1995 Bay-Delta Plan,~~ the SWRCB will convene a workshop approximately every six months to review the parties' progress toward reaching a settlement or other arrangement that ensures that the flow-dependent objectives will be implemented.

1. Failure to Approve Work Plans¹²

~~Both work plans shall provide the following information for each project listed in the work plan: (i) a brief project description, including expected net benefits and their proposed allocations; (ii) a preliminary estimate of the quantity of water or the nature of other water management benefits that can be realized by implementing the project; (iii) a preliminary estimate of the cost of the project; (iv) any major environmental issues associated with the project; (v) a description of how the project can best be implemented, including financing; (vi) a timetable for implementation of the project, including environmental compliance. If the parties proposing the Agreement seek dismissal of Phase 8 after they approve the work plans, they shall provide environmental documentation of the foreseeable environmental effects of a dismissal. Such documentation shall be adequate to support reliance on the commitments of the parties proposing the Agreement as a basis for dismissal. Such environmental documentation may be part of a process that starts with a staged, program, or master environmental documentation.~~

- a. The stay will expire if the parties¹³ proposing the AGREEMENT REGARDING RESOLUTION OF PHASE 8 ISSUES, DEVELOPMENT AND MANAGEMENT OF WATER SUPPLIES, AND A BINDING COMMITMENT TO PROCEED PURSUANT TO SPECIFIED TERMS (Agreement) fail to complete, within 180 days after the date of this Order, a joint work plan listing short term projects that will help implement the 1995 Bay-Delta Plan or fail to approve such work plan within sixty days after its completion. The parties to the Agreement immediately shall notify the SWRCB if they do not meet these deadlines.

¹² ~~Both work plans shall provide the following information for each project listed in the work plan: (i) a brief project description, including expected net benefits and their proposed allocations; (ii) a preliminary estimate of the quantity of water or the nature of other water management benefits that can be realized by implementing the project; (iii) a preliminary estimate of the cost of the project; (iv) any major environmental issues associated with the project; (v) a description of how the project can best be implemented, including financing; (vi) a timetable for implementation of the project, including environmental compliance.~~

¹³¹² The parties proposing the Agreement are DWR, the USBR, the State Water Contractors, Contra Costa Water District, the Northern California Water Association, and the San Luis and Delta-Mendota Water Authority.

- b. The stay will expire if the parties proposing the Agreement fail to complete, within one year after the date of this Order, a joint work plan listing medium and long term projects that will help implement the 1995 Bay-Delta Plan or fail to approve such work plan within sixty days after its completion. The parties to the Agreement immediately shall notify the SWRCB if they do not meet these deadlines.

2. Inadequate Progress

The stay will expire if the SWRCB determines, after review, that the progress of the parties proposing the Agreement toward establishing measures to meet the flow-dependent objectives in the Delta is inadequate or is unlikely to lead to a resolution that ensures implementation of the flow-dependent objectives.

3. Termination of the Agreement

The stay will expire upon termination of the Agreement at any time after it is executed.

4. Dismissal of the Bay-Delta Water Rights Hearing

The stay will expire upon dismissal of the Bay-Delta Water Rights Hearing. The SWRCB will give notice of a proceeding to consider dismissing the Bay-Delta Water Rights Hearing within sixty days after (1) both work plans have been completed and approved by the parties proposing the Agreement and (2) the SWRCB receives a request for dismissal from the parties proposing the Agreement. In the dismissal proceeding, the SWRCB will consider whether the actions completed or committed to by the parties are adequate to support a dismissal. The SWRCB also will consider whether any existing environmental documentation, including any specific environmental analysis prepared in connection with staged, program, or master documentation, adequately analyzes the effects of a dismissal based on approval of the Agreement, work plans, and other commitments of the parties proposing the Agreement.

B. IT IS HEREBY ORDERED that License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively) of the United States Bureau of Reclamation and Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A, respectively) of the Department of Water Resources shall be amended by revising Conditions 1 and 2 in SWRCB Decision 1641 as follows.

1. Licensee/Permittee shall ensure that the water quality objectives for municipal and industrial beneficial uses and agricultural beneficial uses for the western Delta, interior Delta, and export area as set forth in Tables 1 and 2, attached, are met on an interim basis until the Board adopts a further decision in the Bay-Delta Water Rights Hearing assigning responsibility for meeting these objectives. Unless it is renewed pursuant to a further order after notice and an opportunity for hearing, this condition shall expire no later than two years after ~~either~~ (a) notice to the SWRCB of termination of the Agreement, or (b) notice by the SWRCB that the stay of Phase 8 proceedings is lifted, or (c) notice by the SWRCB that it will convene a water right proceeding to determine whether to either extend the effect of this condition or replace it with another condition that meets the objectives in Tables 1 and 2. The SWRCB shall expedite any proceeding it conducts to assign long term responsibility to meet the objectives in Tables 1 and 2, in an effort to keep the proceeding under two years. This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

2. Licensee/Permittee shall ensure that the water quality objectives for Delta outflow and for Sacramento River flow at Rio Vista for fish and wildlife beneficial uses as set forth in Table 3, attached, are met on an interim basis until the Board adopts a further decision in the Bay-Delta Water Rights Hearing assigning responsibility for meeting these objectives. Unless it is renewed pursuant to a further order after notice and an opportunity for hearing, this condition shall expire no later than two years after ~~either~~ (a) notice to the SWRCB of termination of the Agreement, or (b) notice by the SWRCB that the stay of Phase 8 proceedings is lifted, or (c) notice by the SWRCB that it will convene a water right hearing to determine whether to either extend the effect of this condition or replace it with another requirement that meets the objectives in Table 3. The SWRCB shall expedite any proceeding it conducts to assign long term responsibility to meet the objectives in Table 3, in an effort to keep the proceeding under two years. This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

D R A F T

March 22, 2001

C. IT IS HEREBY ORDERED that the SWRCB shall, at least every six months during the term of the Agreement and commencing not later than October 1, 2001, conduct a public informational workshop. The purpose of these workshops will be to provide the public and the SWRCB with information regarding the then-current status of the agreeing parties' implementation of the Agreement, including information about the opportunities for non-parties to the Agreement to provide input. The SWRCB may combine these workshops with the workshops required under ordering paragraph A, above.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on ~~March 7~~ April 4, 2001

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Administrative Assistant to the Board